84-1022 (1)

Office - Supreme Court, U.S.
FILED
DEC 1 1984
ALEXANDER L. STEVAS,
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN W. YOUNG, Petitioner

-VS-

PEOPLE OF THE STATE OF ILLINOIS
Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

GERALD J. MEEHAN
Attorney at Law
312 1st National Bank Bldg.
Rock Island, Illinois 61201
(309) 788-6301
COUNSEL FOR PETITIONER

G. TRENT MARQUIS
MARQUIS, BONNETT & SKOREPA
1800 - 3rd Avenue, Suite 504
Rock Island, Illinois 61201
(309) 788-9577
OF COUNSEL

56 PP

QUESTION PRESENTED FOR REVIEW

Whether evidence admitted as a business record through the testimony of a non-supervising custodian of the business record who possesses no knowledge regarding the procedure used to make the record nor safeguards implemented to insure its accuracy constitutes a violation of an accused's constitionally protected right to confront witnesses against him.

TABLE OF CONTENTS

	Page
Question Presented for Review. .	i
Table of Contents.	ii
Table of Authorities	iii
Prayer	1
Opinion Below.	2
Jurisdiction	3
Constitutional Provisions Involved.	3
Statement of the Case.	5
Reason for Granting the Writ . .	12

THIS PETITION PROVIDES THIS COURT AN OPPORTUNITY TO CLARIFY THE GUIDELINES FOR ADMISSION OF BUSINESS RECORDS AS AN EXCEPTION TO THE HEARSAY RULE AND TO ADDRESS A QUESTION OF FUNDAMENTAL IMPORTANCE TO THE ADMINISTRATION OF CRIMINAL JUSTICE: WHETHER THE ADMISSION INTO EVIDENCE OF COMPUTERIZED BUSINESS RECORDS GENERATED BY ONE ENTITY AND STORED WITH ANOTHER WHEN THE SPONSORING WITNESS OF THE BUSINESS RECORD IS ITS CUSTODIAN WITH NO KNOWLEDGE PRIOR TO HIS RECEIPT OF THE INFORMATION AS TO THE PROCEDURE USED TO COMPILE

Page

THE RECORD OR OF THE PROCEEDINGS IMPLEMENTED TO INSURE ACCURACY VIOLATED THE CONSTITUTIONALLY PROTECTED RIGHT OF THE ACCUSED TO CONFRONT THE WITNESSES AGAINST HIM UNDER THE SIXTH AMENDMENT. SOME COURTS HAVE FOUND COMPILED BUSINESS RECORDS SPONSORED BY AN UNINFORMED CUSTODIAL WITNESS TO QUALIFY AS A BUSINESS RECORD, NOT VIOLATING AN ACCUSED'S SIXTH AMENDMENT RIGHT, WHILE OTHER COURTS HAVE FOUND SUCH RECORDS TO HAVE BEEN IMPROPERLY ADMITTED, THEREBY GENERATING CONFUSION REGARDING A DEFINITION OF THE FOUNDATION PROCESS FOR ADMISSION OF A BUSINESS RECORD.

Conclusion 21

Appendix A - Opinion of the Appellate Court

Appendix B - Illinois Supreme Court Denial

Appendix C - Copy of Exhibit No. 4

TABLE OF AUTHORITIES

Page

Cases

United States v. Miller, 500 F.2d 751 (5th Cir. 1974). . . . 13

United States v. Grossman, 614 F.2d 295 (1st Cir. 1980). . . . 14

United States v. Flom, 558 F.2d 1179(5th Cir. 1977). . . . 15

United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976). . . . 15

United States v. Colyer, 571 F.2d 941 (5th Cir. 1978). . . . 16

National Labor Relations Board v. Termite Control Co., Inc., 646 F.2d 424 (9th Cir.1981) . . 16

People v. Clark, 64 Il. Dec. 835, 440 N.E.2d 387, 108 Il. App. 3d 1071 17

People v. Bovio, 118 Il.App. 3d, 829, 455 N.E.2d 829, 74 Il. Dec. 400. 18

Estate of Buddeke, 49 Il. App. 3d 431, 7 Il. Dec. 285, 364 N.E. 2d 446 18

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN W. YOUNG, Petitioner

-VS-

PEOPLE OF THE STATE OF ILLINOIS
Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

PRAYER

TO THE HONORABLE CHIEF JUSTICE

AND ASSOCIATE JUSTICES OF THE SUPREME

COURT OF THE UNITED STATES:

May It Please The Court:

The Petitioner, John W. Young, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, Third Judicial District.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Third Judicial District, by order of that Court, was not to be published. A copy of the opinion is attached (See Appendix A).

The Order of the Illinois Supreme Court denying Leave to Appeal is not reported; however, a copy of the Order is attached hereto (See Appendix B).

JURISDICTION

The final order of the Illinois Supreme Court denying review was entered on October 2, 1984. This Petition is filed within sixty days of the order of the Illinois Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

On July 8, 1982, police officers searched the Defendant's place of employment seizing therefrom a motorcycle fork and one-half of a motorcycle engine casing (R. 21). The Defendant thereafter was charged with a violation of his previously imposed probation (C. 44-45) with a trial held on December 22, 1982 (C. 110).

At the trial on December 22, 1982, after the allegation was amended without objection, a hearing was held on the petition to revoke the Defendant's probation on the allegation that the Defendant knowingly obtained control of certain property of Jeff Rasche, being a 1962 Harley Davidson motorcycle, under such

---

*Citations are to the State record. "C" refers to the common law record, "R" to the transcripts of the hearing (the entire transcript of the hearing being found at C. 110).

circumstances as would reasonably induce him to believe that the motorcycle was stolen and intending to permanently deprive Jeff Rasche of the use of the property, having a value in excess of $300.00 (C.74).

The motorcycle fork, confiscated from the Defendant's place of employment, bore serial no. A8303, and at the trial was marked as People's Exhibit 1 (R. 7-15). The one-half engine case, though not having any identifiable part numbers visible, did in fact have the name "Jeff" etched on its inside surface (R. 48). The engine casing was introduced as People's Exhibit 2.

The victim in this case, Jeff Rasche, had not previously seen the inside of the engine casing, had not placed the name "Jeff" on the engine casing, and was unable to identify Exhibit 2 (R. 48).

Jeff Rasche testified to having purchased the motorcycle in September, 1979 from Tim Haut (R. 45). He then reported his motorcycle stolen June 17 or June 18, 1982 (R. 44). When he purchased the motorcycle, he received a title from Tim Haut, which though still open was in fact the title for the motorcycle he purchased. The title was marked and entered into evidence as People's Exhibit 3 (R. 55).

Sandra Viggiani, a witness called by the State, testified that her employer is the National Automobile Theft Bureau, hereinafter called the N.A.T.B., located in Palos Hills, Illinois (R. 24-25). Ms. Viggiani testified that her company receives serial numbers, part numbers and assembly of component parts information from numerous companies, including the Harley Davidson Company. She testified

that the business of N.A.T.B. is to receive and store such records (R. 23-26). The witness, over objection, testified that the fork number A8303, People's Exhibit 1 (R. 26), was assembled with vehicle number 62XLCH4674, crankcase number 7622237, and frame number A7660 (R. 38 and R. 40). This information was incorporated in an Affidavit marked People's Exhibit 5, which, after examination by the Judge, was not admitted into evidence (R. 39). Said Affidavit, however, contained the further information that this motorcycle was shipped to Harley Davidson in Davenport, Scott County, Iowa (R. 43).

The objection raised by defense counsel was based upon the failure to qualify People's Exhibit 4 (R. 43), an exhibit prepared by the witness specifically for this case as a business record (R. 26-28). The business record objection

also addressed the attempt by the State to have the witness testify as to the content of the business record, even though People's Exhibit 4 was ultimately not admitted (R. 30). See Appendix C.

The Defendant, through a number of witnesses, adduced evidence that he had purchased the motorcycle frame (People's Exhibit 1) and the engine casing (People's Exhibit 2) on two separate occasions and at two different locations (R. 81-85, 90, 94, 96-100). The Defendant also testified in his own defense, denying the allegations against him and recounting how he came to be in possession of the respective motorcycle parts (R. 107-115).

During the closing arguments, the Court interjected and stated: "Let me ask this - how can I believe Mr. Rasche and believe your client's witnesses? I have to accept one version, don't I?" Then

Mr. Marquis: "Of what?" The Court: "Mr. Rasche testified his bicycle was stolen in June of 1982 and isn't it true that these exhibits are part of his bicycle; and your client and his witnesses could not have had it or bought it in the first part of June, the first week of June?" (R. 128). The Court further stated: "The Court finds that from a preponderance of evidence, that the parts identified as People's Exhibits 1 and 2 are parts of the motorcycle of Jeffrey Rasche; that the motorcycle was stolen from Mr. Rasche on or about June 17 or June 18, 1982. And accepting that testimony as true, the Court disbelieves the testimony of Mr. Washburn, Slaughter, Gregory and the Defendant, as to when and the circumstances to which Mr. Young came into possesion and the time he came into possession of the parts ...." (R. 132). The Court thereafter revoked

the Defendant's probation and ordered a pre-sentence report (R. 132).

At a sentencing hearing held on March 31, 1983, the Judge denied the Defendant's post-trial motion (C. 111-12). The Defendant was sentenced on Count I to eighteen (18) month in the Department of Corrections with a one-year supervised mandatory release; and was sentenced to thirty (30) months probation, with the first six (6) months to be spent in the Rock Island County Jail on Count III, to run concurrently with the sentence imposed in Count I. The Defendant appealed.

The Petitioner's appeal to the Illinois Appellate Court regarding the hearsay evidence and failure to comply with business records was denied. Petitioner, after denial of a petition for rehearing to the Appellate Court, appealed to the Illinois Supreme Court, reiterating

the claims to the Illinois Appellate Court. This Petition follows.

REASON FOR GRANTING THE WRIT

THIS PETITION PROVIDES THIS COURT AN OPPORTUNITY TO CLARIFY THE GUIDELINES FOR ADMISSION OF BUSINESS RECORDS AS AN EXCEPTION TO THE HEARSAY RULE AND TO ADDRESS A QUESTION OF FUNDAMENTAL IMPORTANCE TO THE ADMINISTRATION OF CRIMINAL JUSTICE: WHETHER THE ADMISSION INTO EVIDENCE OF COMPUTERIZED BUSINESS RECORDS GENERATED BY ONE ENTITY AND STORED WITH ANOTHER WHEN THE SPONSORING WITNESS OF THE BUSINESS RECORD IS ITS CUSTODIAN WITH NO KNOWLEDGE PRIOR TO HIS RECEIPT OF THE INFORMATION AS TO THE PROCEDURE USED TO COMPILE THE RECORD OR OF THE PROCEDURES IMPLEMENTED TO INSURE ACCURACY VIOLATES THE CONSTITIONALLY PROTECTED RIGHT OF THE ACCUSED TO CONFRONT THE WITNESSES AGAINST HIM UNDER THE SIXTH

AMENDMENT. SOME COURTS HAVE FOUND COMPILED BUSINESS RECORDS SPONSORED BY AN UNINFORMED CUSTODIAL WITNESS TO QUALIFY AS A BUSINESS RECORD, NOT VIOLATING AN ACCUSED'S SIXTH AMENDMENT RIGHT, WHILE OTHER COURTS HAVE FOUND SUCH RECORDS TO HAVE BEEN IMPROPERLY ADMITTED, THEREBY GENERATING CONFUSION REGARDING A DEFINITION OF THE FOUNDATION PROCESS FOR ADMISSION OF BUSINESS RECORD.

Trial Judges are afforded considerable discretion in a determination of whether a document qualifies for admission into evidence as a business record. United States v. Miller, 500 F. 2d 751. (5th Cir. 1974). A determination as to whether a given document does in fact qualify as a business record is easily made when testimony clearly can establish that the sponsoring witness either made the entries in question or supervised other persons who

made the entries in question at or near the time of the occurrence being recorded and pursuant to a procedure of regularly conducted business. United States v. Grossman, 614 F. 2d 295 (1st Cir. 1980).

The issue of whether an accused's right to confront the witnesses is violated becomes considerably more clouded when the sponsoring witness for the business records possesses little or no knowledge regarding the creation of the record or its accuracy. This problem is further accentuated by the onslaught of the computer age. As is evidenced by the instant case and by an ever increasing number of similar cases, computerized information developed at one source is now often stored in other locations and under the supervision of totally separate entities. In order to attempt to formulate guidelines for evidence in the nature of a

business record offered through testimony of the custodial witness, a trend in the opinions seems to be developing towards placing emphasis on reviewing other factors to determine the reliability of the business record so offered. United States v. Flom, 558 F.2d 1179 (5th Cir. 1977).

Under the rationale of Flom in defining the necessary foundation under Federal Rules of Evidence 803(6), the sponsoring witness for the offered business record need not have been the person who prepared or even supervised the preparation of the record under circumstances which would otherwise insure the trustworthiness of the business record offered. United States v. Flom at 1182. See also United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976).

Where the trial court is satisfied that the offered business record

demonstrates the appropriate trustworthiness even though offered through the testimony of a person who neither supervised over or prepared the record, the Sixth Amendment right of confrontation is not violated. United States v. Colyer, 571 F.2d 941 (5th Cir. 1978).

The problem left unanswered by the aforementioned cases, however, is one of defining the appropriate degree of trustworthiness necessary in order to relieve the State of its responsibility to bring forth as a sponsoring witness either the person who made the entry or supervised and has knowledge regarding the procedure used to make the entries and insure reliability. The problem of defining the appropriate level of trustworthiness that must be found was addressed in National Labor Relations Board v. First Termite

Control Co., Inc., 646 F.2d 424 (9th Cir. 1981). In the National Labor Relations Board case, the 9th Circuit Court of Review ruled the business record inadmissible because of a lack of evidence addressing the issue of reliance upon the information by the custodial entity or other indication of trustworthiness.

In the instant case, the Third Appellate District of the State of Illinois resolved the issue of the admissibility of the business record against the Defendant by determining that the sponsoring witness's lack of knowledge regarding the data contained in the business record affected only its weight, not its admissibility. In what would appear to be in direct conflict with the instant case, as decided by the Third Appellate District of the State of Illinois, are People v. Clark, 64 Il. Dec. 835, 440 N.E. 2d 387,

108 Il. App. 3d 1071, and People v. Bovio, 118 Il. App. 3d 829, 455 N.E. 2d 829, 74 Il. Dec. 400.

The sponsoring witness in Bovio, as in the instant case, was the custodian of the micro-fiche information received from a data center. Since she possessed no knowledge, however, regarding the equipment used at the data center or the method used to place the information into the computer at the data center, the Court found insufficient proof of trustworthiness regarding the data center where the information orginated to justify admission of the records over which she was custodian as a business record. See also Estate of Buddeke, 49 Il. App. 3d 431, 7 Il. Dec. 284, 364 N.E. 2d 446.

The primary consideration, particularly in the setting of criminal justice, is one of balancing the practicalities of evidence

generated as a result of the computer age against the right of the accused to confront the witness against him. It is submitted that inherent in a hearsay objection and in an objection to introduction of a document under the business record exception to hearsay is the underlying right of an accused to cross-examine a witness against him.

While it is submitted that the Court must consider numerous factors to determine the trustworthiness of an offered business record, the mere fact that a custodian receives computerized information should not be used to boot-strap that information to trustworthiness. For a Court to rule that the sponsoring witness's total lack of information concerning the method used to place the data into the computer, or the method to insure continued reliability of information goes only to the weight

rather than the admissibility of the evidence, places an impossible burden on a Defendant.

It is submitted that cross-examination of such a witness is for all practical purposes no cross-examination at all, in violation of an accused's right to confront the witness, as protected by the Sixth Amendment.

CONCLUSION

The guidelines for admission of a business record, when offered through the testimony of a non-supervising and uninformed custodial witness, are in need of clarification. The Petitioner's Sixth Amendment right to confront the witnesses against him was violated under the circumstances of this case by the admission of the business record as evidence against him.

Wherefore, Petitioner respectfully requests that a Writ of Certiorari issue to the Appellate Court of Illinois, Third Judicial District.

Respectfully submitted,

ORIGINAL DULY EXECUTED

GERALD J. MEEHAN
Attorney at Law
312 1st National Bank Bldg.
Rock Island, IL 61201
(309) 788-6301

COUNSEL FOR PETITIONER

G. TRENT MARQUIS
MARQUIS, BONNETT & SKOREPA
1800 - 3rd Avenue, Suite 504
Rock Island, Illinois 61201
(309) 788-9577

OF COUNSEL

APPENDIX A

STATE OF ILLINOIS

(SEAL)

3-83-0311

APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held in Ottawa, on the 1st Day of January in the year of our Lord one thousand nine hundred and eighty-three, within and for the Third District of Illinois:

Present-

HONORABLE ALLAN L. STOUDER,
Presiding Justice

HONORABLE JAY J. ALLOY,
Justice

HONORABLE JAMES D. HEIPLE,
Justice

HONORABLE ALBERT SCOTT,
Justice

HONORABLE TOBIAS BARRY,
Justice

JOSEPH FENNESSEY, Clerk

BE IT REMEMBERED, that afterwards on February 10, 1984 the Order of the Court was filed in the Ckerk's Office of said Court, in the words and figures following viz:

Case No. 3-83-0311

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1984

The PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Fourteenth
Plaintiff-Appellee,	)	Judicial, Rock Island County,
vs.	)	Illinois
JOHN W. YOUNG,	)	Honorable Edward Keefe
Defendant-Appellant.	)	Judge Presiding

PRESIDING
Mr. JUSTICE STOUDER delivered the Order of the court: "NOT TO BE PUBLISHED"

On April 30, 1982 defendant, John W. Young, pleaded guilty to the offenses of illegal possession of a controlled substance and illegal possession of metal knuckles. The circuit court of Rock Island County sentenced the defendant to two years probation. In July, 1982, a petition for revocation of defendant's probation was filed alleging defendant had

violated the terms of his probation by committing the offense of theft on July 8, 1982. After a hearing the defendant was found to have committed the theft thereby violating the terms of his probation. His probation was revoked and the defendant was sentenced to imprisonment on the original convictions.

On this appeal the defendant raised two issues. Did the trial court err in admitting and considering inadmissible heresay testimony? Was the defendant proved guilty by a preponderance of the evidence? We affirm.

The theft charged in the probation revocation petition was that of a Harley-Davidson motorcycle. According to Jeffrey Rasche, he purchased a Harley-Davidson sportster in September, 1979 from Tim Haut and that it was stolen from him on either June 17 or 18, 1982. The title endorsed in blank from Haut was introduced

as an exhibit. Police officers testified to finding parts of a disassembled Harley-Davidson sportster in the possession of the defendant and a fork assembly and a part of a crankcase seized from the defendant's possession were introduced as exhibits. Rasche identified the fork assembly as being from his motorcycle referring to wear areas on the brake and clutch handles.

Also testifying for the prosecution was Sandra Viggiani, an employee of the National Automobile Theft Bureau (hereinafter referred to as N.A.T.B.). Viggiani testified that her company receives serial numbers, part numbers and assembly of component parts information from numerous companies, including the Harley-Davidson Motorcycle Company. She stated it was their business to receive and store such records. She testified over objection that the parts numbers on the exhibits

were shown by the records in her office to be the same numbers as on the motorcycle stolen from Rasche.

The defendant and several witnesses testifying in his behalf presented evidence tending to show the defendant had purchased several disassembled Harley-Davidson sportsters, that he attended "swap meets" where motorcycles and parts were sold and that he had purchased the disassembled parts, found in his possession, early in June.

It is the defendant's principal assignment of error on this appeal that the trial court should not have admitted the testimony of Sandra Viggiani under the business record exception.

As indicated earlier, Viggiani was an employee of the N.A.T.B. and she testified about certain records kept by the organization. She testified that the N.A.T.B. is a non-profit organization,

sponsored by associated insurance companies, which keeps by way of computerized systems, information coming into their office from various manufacturers, including Harley-Davidson. Included within this information are records of vehicle identification numbers and the assembly of component parts of each motorcycle.

Though she maintained those records are kept in the normal course of the business and that it was the N.A.T.B.'s normal business to keep such records, and that the records are made as they are received by the N.A.T.B., she acknowledged that the N.A.T.B. merely receives information from others, thereafter storing it. She conceded that neither she nor anyone else at the N.A.T.B. participated in, supervised over or had any knowledge whatsoever regarding the accuracy of or method of compiling the data constituting the original records which are sent to them.

An effort was made by the prosecution to introduce as an exhibit an affidavit of Viggiani together with a facsimile of the microfilm record kept by the N.A.T.B. to which objections were interposed and allowed. The apparent basis for excluding the exhibit was that it was not the business record itself and authentication by affidavit was inappropriate. Of course since Viggiani was present and testifying, she testified to the same facts which were included in the record. Her testimony about parts, assembly and serial numbers from the records of the organization admittedly connected the parts of the Harley Davidson motorcycle in the defendant's possession with the one stolen from Rasche.

According to the defendant, the microfilm record kept by the N.A.T.B. was inadmissible as a business record and Viggiani's testimony regarding such record

was doubly inadmissible because the absence of the microfilm record was not satisfactorily explained.

The statutory basis for the admission of business records is found in Ill. Rev. Stat. 1981, ch. 38, par. 115-5 which provides:

> "115-5. Business Records as Evidence. (a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in regular course of any business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight,

but such circumstances shall not affect its admissibility."(Ill. Rev. Stat. 1981, ch. 38, par. 115-5).

According to Professors Cleary and Graham:

"The theory upon which entries in the regular course of business are admissible as an exception to the Hearsay Rule is that since their purpose is to aid in the proper transaction of the business and they are useless for that purpose unless accurate, the motive for following a routine of accuracy is great and the motive to falsify nonexistent.(Citations) Under this view, it makes no difference whether the records are those of a party or of a third person.

***

If all persons who participated in the furnishing of information and the making of entries must be called as witnesses, then the heresay exception for records of regularly conducted activities goes no farther than the ones for recorded recollection. ***Under both Rule 236 and Sec. 115-5(a), business records

> are admissible upon the testimony of the custodian of the writing or record or the person familiar with the business and its mode of operation, identifying the writing or record and establishing that a routine was followed producing accuracy; neither the original entrant nor the individual possessing personal knowledge of the event itself need be produced. ***Thus it is sensibly recognized that the dependability of regular entries rests upon proof of a routine of making accurate records, rather than upon the testimony of each participant that he himself was accurate. Lack of personal knowledge of the entrant or maker may be shown to affect the weight to be given to the record but does not effect (sic) its admissibility." (E. Cleary and M. Graham, Handbook of Illinois Evidence, 438, 441-42 (3d ed. 1979.)

Unlike the lease agreement, held not to have been kept in the regular course of business in People v. Clark (1982),

108 Ill. App. 3d 1071, 440 N.E. 2d 397, the principal case relied upon by the defendant, we believe the records referred to in this case were kept by the N.A.T.B. in the regular course of its business and properly considered a business record. Its business was that of recording, storing and classifying information about motorcycles. (People v. Mormon (1981), 97 Ill. App.3d 556, 422 N.E. 2d 1065) To the extent that the defendant considers that the probative value of the records as an exception to the heresay rule is diminished, it is a matter of credibility or weight and not a matter of competence.

We also believe that the trial court did not abuse its discretion in permitting testimony about the record rather than its actual introduction. If the defendant had

any doubt about the authenticity of the record either as revealed by the testimony of Viggiani or as set forth in the facsimile of the record, he could have requested an opportunity to compare such evidence with the original record if he so desired. People v. Morman (1981), 97 Ill. App.3d 556, 422 N.E.2d 1065.

The defendant has also argued about the sufficiency of the evidence to support the judgment revoking his probation but, since such argument is premised on consideration of this issue in the absence of the testimony of Viggiani, it follows that since we believe her testimony was admissible, the judgment of the court is also supported by sufficient evidence.

For the foregoing reasons, the

judgment of the circuit court of Rock Island County are affirmed.

Judgments affirmed.

SCOTT and HEIPLE,JJ., concur.

STATE OF ILLINOIS,)
APPELLATE COURT,) ss.
THIRD DISTRICT,)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of February, in the year of our Lord one thousand nine hundred eighty four.

/s/ Joseph Fennessey
Clerk of the Appellate Court

THE APPELLATE COURT

THIRD DISTRICT, STATE OF ILLINOIS

(SEAL)

JOSEPH FENNESSEY
CLERK OF COURT

OTTAWA, ILLINOIS 61350
815 434-5050

Be it Remembered, That, to wit: On the 29th day of March, 1984, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

3-83-0311

People of the State
of Illinois,
Appellee

vs.

John W. Young,
Appellant

Appeal From:
Rock Island County
Hon. Edward Keefe
81 CF 149

Now on this day this cause coming on for hearing upon the petition for rehearing filed herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in

the premises;

It is therefore ordered by the Court that said petition for rehearing herein, be and the same is hereby overruled and denied and that said petitioner pay the costs and charges herein taxed.

/s/ Joseph Fennessey
Clerk of the Appellate Court

APPENDIX B

60084

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
(217) 782-2035

October 2, 1984

Mr. G. Trent Marquis
Marquis, Bonnett & Skorepa
1800 - 3rd Ave., S#504
Rock Island, IL 61201

No. 60084 - People State of Illinois, respondent, vs. John W. Young, petitioner. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Clerk of the Appellate Court on October 23, 1984.

APPENDIX C

NATIONAL AUTOMOBILE THEFT BUREAU

WESTERN DIVISION
Robert E. Sattier,
Manager
Charles E. Gray,
Assistant Manager

10330 South Roberts
Road 1-A
Palos Hills,
Illinois 60465

AFFIDAVIT

Sandra Viggiani being first duly sworn on oath deposes and says:

That the National Automobile Theft Bureau receives in the regular course of business records from Harley Davidson Motorcycle Company, Milwaukee, Wisconsin, encompassing Harley Davidson assembly and shippint information.

These records reflect that 1962 Harley Davidson, fork number A8303 was a net unit with vehicle identification number 62XLCH4674, crankcase number 7622237, frame number A7660 and the unit was shipped to Harley Davidson, Davenport, Iowa.

Further affiant saith not.

/s/ Sandra Viggiani
SIGNATURE

Office Supervisor
TITLE

10330 S. Roberts Road
Palos Hills, Ill.
ADDRESS

Subscribed and sworn to before me this 15th day of July, A.D. 1982.

Notary Public

/s/ Jane Ann Hischier

418 Nicholson St.
Joliet, Illinois

My commission expires
May 5, 1986

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN W. YOUNG, Petitioner

-VS-

PEOPLE OF THE STATE OF ILLINOIS
Respondent

CERTIFICATE OF SERVICE

I, Gerald J. Meehan, a member of the bar of this Court and representing Petitioner in this cause, certify:

(1) That I have served one copy of the Petition for Writ of Certiorari on counsel for Respondent, by depositing same in a United States Post Office mail box at Rock Island, Illinois 61201, with first class postage prepaid, and with the envelope addressed as follows:

Honorable Neil Hartigan
Attorney General
188 W. Randolph - Suite 2200
Chicago, Illinois 60601

(2) The above named party is the only party required to be served.

(3) I further state to the best of my knowledge that the Court's copies of these documents were enclosed in an envelope, properly addressed to the Clerk of this Court, and that said envelope was deposited in a United States Mail Box at Rock Island, Illinois 61201, with first class postage prepaid on the 1st day of December, 1984, which is within the permitted time of filing.

ORIGINAL DULY EXECUTED

GERALD J. MEEHAN

SUBSCRIBED AND SWORN TO
before me this 1st day of
December, A.D. 1984.

ORIGINAL DULY EXECUTED

NOTARY PUBLIC

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN W. YOUNG, Petitioner

-VS-

PEOPLE OF THE STATE OF ILLINOIS
Respondent

CERTIFICATE OF SERVICE

I, Gerald J. Meehan, a member of the bar of this Court and representing Petitioner in this cause, certify:

(1) That I have re-served three copies of the Petition for Writ of Certiorari on counsel for Respondent, by depositing same in a United States Post Office mail box at Rock Island, Illinois 61201, with first class postage prepaid, and with the envelope addressed as follows:

Honorable Neil Hartigan
Attorney General
188 W. Randolph - Suite 2200
Chicago, Illinois 60601

(2) The above named party is the only party required to be served.

(3) I further state to the best of my knowledge that the Court's copies of these documents were enclosed in an envelope, properly addressed to the Clerk of this Court, and that said envelope was deposited in a United States Mail Box at Rock Island, Illinois 61201, with first class postage prepaid on the 21st day of December, 1984, which is within the permitted time of filing.

ORIGINAL DULY EXECUTED

GERALD J. MEEHAN

SUBSCRIBED AND SWORN TO
before me this 21st day
of December, A.D. 1984.

ORIGINAL DULY EXECUTED

NOTARY PUBLIC

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN W. YOUNG, Petitioner

-VS-

PEOPLE OF THE STATE OF ILLINOIS
Respondent

APPEARANCE

The Clerk will please enter my appearance as Counsel for the Petitioner.

ORIGINAL DULY EXECUTED

GERALD J. MEEHAN
Attorney at Law
312 1st National Bank Bldg.
Rock Island, Illinois 61201
(309) 788-6301

COUNSEL FOR PETITIONER

G. TRENT MARQUIS
MARQUIS, BONNETT & SKOREPA
1800 - 3rd Avenue, Suite 504
Rock Island, Illinois 61201
(309) 788-9577

OF COUNSEL

The Clerk is further requested to notify counsel of action of the Court by means of regular mail.

FILED
JAN 28 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN W. YOUNG,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Third District

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General of Illinois

JILL WINE-BANKS
Solicitor General of Illinois

MARK L. ROTERT *
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Attorneys for Respondent

ELLEN M. FLAUM
Assistant Attorney General
Of Counsel

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 32141—50—1-24-85)

QUESTIONS PRESENTED FOR REVIEW

Whether this Court is without jurisdiction as the federal question presented was not raised or decided in the state court below.

Whether the petitioner has presented a substantial federal question regarding the admission of business records.

TABLE OF CONTENTS

	PAGE(S)
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
STATEMENT OF FACTS	2
REASONS FOR DENYING THE WRIT:	
I.	
THIS COURT IS WITHOUT JURISDICTION AS THE FEDERAL QUESTION PRESENTED WAS NOT RAISED OR DECIDED IN THE STATE COURT BELOW	3
II.	
PETITIONER HAS NOT PRESENTED A SUBSTANTIAL FEDERAL QUESTION REGARDING THE ADMISSION OF BUSINESS RECORDS	5
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:	PAGE(S)
California v. Green, 399 U.S. 149 (1970)	6
Cardinale v. Louisiana, 394 U.S. 437 (1969) ...	3
Nussbaum Trucking v. Illinois Commerce Comm., 99 Ill. App. 3d 741, 425 N.E.2d 1229 (1981) .	7
Ohio v. Roberts, 448 U.S. 56 (1980)	6
People v. Bovio, 118 Ill. App. 3d 836, 455 N.E.2d 829 (1983)	8
People v. Clark, 108 Ill. App. 3d 1071, 440 N.E.2d 397 (1982)	8
Street v. New York, 394 U.S. 576 (1969)	5
United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978)	8

MISCELLANEOUS:

Fed. R. Evid. 803, Notes of Advisory Committee on Proposed Rules	7
Ill. Rev. Stat. 1981, ch. 38, par. 115-5	7

No. 84-1022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN W. YOUNG,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Third District

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The Appellate Court of Illinois, Third District, affirmed the revocation of petitioner's probation in an unpublished order, No. 3-83-0311, dated February 10, 1984. The text of that order is set out in the petition for a writ of certiorari as Appendix A. A petition for rehearing was denied by the court on March 29, 1984, and a petition for leave to appeal to the Illinois Supreme Court was denied on October 2, 1984.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. §1257(3). As treated more fully below, however, the respondent submits that this jurisdiction is not properly invoked. Alternatively, respondent maintains the petitioner has not shown any good reason for this Court to exercise its sound judicial discretion and grant the petition for a writ of certiorari.

STATEMENT OF THE CASE

Respondent adopts the statement of facts contained in the Illinois Appellate Court order (Appendix A of Petition) and incorporates those facts by reference.

REASONS FOR DENYING THE WRIT

I.

THIS COURT IS WITHOUT JURISDICTION AS THE FEDERAL QUESTION PRESENTED WAS NOT RAISED OR DECIDED IN THE STATE COURT BELOW.

Petitioner has claimed jurisdiction by this Court under 28 U.S.C. §1257(3) which provides in part that a decision by the highest court of a state may be reviewed "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." However, this Court has firmly established that it will not decide federal constitutional issues raised for the first time on review of state court decisions under this jurisdictional statute. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Respondent submits, therefore, that this Court is without jurisdiction as petitioner did not specifically set up or claim the Sixth Amendment question now raised in the instant petition before any state court below.

Petitioner states the issue before this Court is "whether evidence admitted as a business record through the testimony of a non-supervising custodian of the business record who possesses no knowledge regarding the procedure used to make the record nor safeguards implemented to insure its accuracy constitutes a violation of an accused's constitutionally protected right to confront witnesses against him." (Petition at p. 1) The issue as presented to the state courts, however, was not framed in federal constitutional terms, but rather as a question of the admissibility of the evidence under the business record exception to the hearsay rule.

At his probation revocation hearing, petitioner objected to the testimony of a witness regarding the contents of a microfilmed record which she did not prepare, but only received for filing, storage and retrieval. The witness was an employee of the National Automobile Theft Bureau (N.A.T.B.). (C. 110, R. 23) That organization receives shipping information containing vehicle identification numbers and component part numbers from the manufacturers of Harley-Davidson motorcycles. (C. 110, R. 24-25) This information is received on microfilm from the manufacturers and the microfilm is filed and stored by the N.A.T.B. (C. 110, R. 29-30) The witness supervised the filing and keeping of these microfilms. (C. 110, R. 29) At the request of the prosecution, the witness had viewed the microfilm records to determine the vehicle identification number which corresponded to a component part number supplied by the prosecution and had prepared an affidavit containing the information she obtained from the microfilm record. (C. 110, R. 25-26)

The basis of petitioner's objections to the testimony of the witness was that she had no first hand knowledge as to the accuracy or preparation of data contained in the microfilm records. (C. 110, R. 26, 31-32, 33, 36) While admitting the witness' testimony over objection, the trial court excluded the affidavit. On his motion for a new trial, petitioner again argued that the witness had no personal knowledge as to the original entries on the microfilm records and that her testimony was therefore inadmissible hearsay. (C. 111, R. 3-5) In its unpublished order, the Illinois Appellate Court stated, "It is the defendant's principal assignment of error on this appeal that the trial court should not have admitted the testimony of [the witness] under the business record exception." (*See* Appendix A of Petition)

Petitioner had consistently argued, therefore, that the witness' lack of personal knowledge of the making of the records she stored precluded their qualification as business records and rendered her testimony as to their contents incompetent. There had been no express or direct contention that the admission of the records constituted a violation of petitioner's right to confrontation. This is made evident by the Illinois Appellate Court order which contains no reference to any such federal question, but rather cites to the Illinois statute governing the admission of business records in concluding that the records referred to in this case were properly considered as business records. This Court has held that "when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). As no federal question was either raised or passed upon in the state court below, the instant petition for a writ of certiorari should be denied for want of jurisdiction.

II.

PETITIONER HAS NOT PRESENTED A SUBSTANTIAL FEDERAL QUESTION REGARDING THE ADMISSION OF BUSINESS RECORDS.

Petitioner asserts that this Court should exercise its discretion to review the judgment of the Illinois Appellate Court in order to determine whether the admission of business records based upon the testimony of a sponsoring witness who has no personal knowledge of the making of the entries in those records violates the Sixth Amendment right to confrontation. Petitioner acknowledges, however, that trial judges are afforded considerable discretion

in determining whether a document qualifies for admission as a business record and that the sponsoring witness need not have been the person who prepared or even supervised the preparation of the record where the circumstances indicate the trustworthiness of the offered record. (Petition at pp. 13, 15-16) Thus, the gravamen of the issue presented by the petitioner is, in his own words, the problem "of defining the appropriate degree of trustworthiness necessary in order to relieve the State of its responsibility to bring forth as a sponsoring witness either the person who made the entry or supervised and has knowledge regarding the procedure used to make the entries and insure reliability." (Petition at p. 16) Respondent submits that this does not constitute a substantial federal question, but is simply a matter of state evidentiary law.

In *California v. Green*, 399 U.S. 149, 155 (1970), this Court observed that:

> While it may be readily conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.

Further, this Court has stated that it "has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all hearsay exceptions.' " *Ohio v. Roberts*, 448 U.S. 56, 64-65 (1980) (citing *California v. Green*, 399 U.S. at 162). The admission of business records as an exception to the hearsay rule without a showing of the unavailability of the maker is grounded on the theory that such records have a special indicia of reliability based in part on the regularity of their mak-

ing and the reliance placed on them by business. *See* Fed. R. Evid. 803, Notes of Advisory Committee on Proposed Rules.

In Illinois the statute governing the admission of business records in criminal trials provides that:

> Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in regular course of any business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

Ill. Rev. Stat. 1981, ch. 38, par. 115-5. The custodian or other witness need not have personal knowledge of the matter recorded. *Nussbaum Trucking v. Illinois Commerce Comm.*, 99 Ill. App. 3d 741, 425 N.E.2d 1229 (1981). In the instant case, the testimony established that the manufacturer's shipping records, identifying the vehicle registration number and component part numbers of motorcycles were routinely supplied to N.A.T.B. on microfilm and that these microfilm records were not altered or modified in any manner, but were merely filed and stored for retrieval. (C. 110, R. 26, 30, 39-40) There is nothing to indicate that such records were lacking in trustworthiness.

Petitioner relies, however, on what he regards as a conflict between various Illinois appellate court decisions on

the question of establishing the trustworthiness of records through a custodian witness. An alleged conflict among the appellate courts of a state in determining the admissibility of business records under a state statute does not constitute a substantial federal question. The Illinois Appellate Court distinguished the case of *People v. Clark*, 108 Ill. App. 3d 1071, 440 N.E.2d 397 (1982) on the grounds that the record in that case was not kept in the regular course of business while the records in the instant case were kept by N.A.T.B. in the regular course of their business. (*See* Appendix A of Petition) *People v. Bovio*, 118 Ill. App. 3d 836, 455 N.E.2d 829 (1983), which petitioner now cites, involved banking records generated by a computer system which performed calculations on the data entered. The records were held inadmissible in the absence of testimony going to the accuracy of the system which performed the calculations. The records in the instant case, however, were microfilmed shipping records which presumably involved no calculation of data.

The testimony adduced at trial established that the records in the instant case, while originally prepared by the manufacturer, were kept in the regular course of business by N.A.T.B. and were routinely used to provide vehicle identification information to law enforcement agencies. (C. 110, R. 24) This constitutes sufficient indicia of trustworthiness to support their admission. *See United States v. Ullrich*, 580 F.2d 765 (5th Cir. 1978).

Petitioner has not presented a substantial federal question based on the particular facts and circumstances of the instant case and, accordingly, the petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General of Illinois
JILL WINE-BANKS
Solicitor General of Illinois
MARK L. ROTERT *
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570
Counsel for Respondent

ELLEN M. FLAUM
Assistant Attorney General
Of Counsel

* Counsel of Record